IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,
Petitioner,

v.

DANIEL ACKERMAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF COMMITTEE OF PENNSYLVANIA PUBLIC DEFENDERS AS AMICUS CURIAE

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INTEREST OF COMMITTEE OF PENNSYLVANIA PUBLIC DEFENDERS AS AMICUS CURIAE

The *ad hoc* Committee of Pennsylvania Public Defenders was formed for the purpose of filing this *amicus curiae* brief. The Committee is composed of 60 of the 65 heads of county Public Defender offices throughout Pennsylvania, and their names and identifications are listed in Appendix A to this brief. Dante G. Bertani is the past president of Public Defender Association of

Pennsylvania, having served in that capacity for three years. Blake E. Martin, Jr., is now the President of the Public Defender Association of Pennsylvania.

The public defender system in Pennsylvania was created by the Public Defender Act, Pa. Stat. Ann. tit. 16, § 9960.1, et seq. (Purdon). Under the provisions of that statute, the commissioners of each county appoint a public defender, and assistant public defenders as may be required. The public defender is responsible to provide legal counsel in criminal matters "to any person who, for lack of sufficient funds, is unable to obtain legal counsel." § 9960.6

The Committee of Pennsylvania Public Defenders has a vital interest in providing utmost freedom to its members to furnish a vigorous defense for those accused of crimes, so that defendants who are indigent receive a qualify of representation equal to any. The Committee believes that absolute immunity for all government-sponsored defense counsel is necessary for the continued vitality of the judicial phase of the criminal justice system. It is further necessary to attract and hold fine and sensitive lawyers in the low-paying positions as defenders and thus to discharge the public duty of providing the best possible defense to those not otherwise able to afford it.

The members of the Committee of Pennsylvania Public Defenders are government-sponsored defense counsel who daily perform advocacy functions in our criminal justice system. The members are in the unique position of dealing daily with those accused of crime and of knowing their attitudes and the attitudes of the other participants in the criminal courtroom. The Committee believes that this knowledge and understanding will provide some assistance to the Court in making a determination of the important issues so critical to the vitality of the public defender system.

Both parties have consented to permit the Committee of Pennsylvania Public Defenders to file this brief.

ARGUMENT

I. ABSOLUTE IMMUNITY SHOULD BE ACCORDED THE GOVERNMENT-SPONSORED CRIMINAL DEFENSE LAWYER

The criterion established by this Court for determining the applicability of the immunity doctrine, in each case, is to undertake "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). In deciding whether a government-sponsored criminal defense lawyer is entitled to absolute immunity, inquiry must be made into relevant case law and consideration must be given to the public policy reasons supporting immunity.

A. Common Law Immunity Accorded the Government-Sponsored Criminal Defense Lawyer

The requirement of government-sponsored defense counsel for indigents accused of crime is of relatively recent origin. Nonetheless, the history of common law on the issue of absolute immunity for the government-sponsored criminal defense lawyer, though brief, has produced more than a few decisions. This considerable body of law is instructive, and leads to the important conclusion that absolute immunity has been accorded by every federal appellate court which has considered the issue. *Jones* v. *Warlick*, 364 F.2d 828 (4th Cir. 1966); *Sullens* v. *Carroll*, 446 F.2d 1392 (5th Cir. 1971); *Brown* v. *Joseph*, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); *Waits* v. *McGowan*, 516 F.2d 203 (3d Cir. 1975); *Minns* v. *Paul*, 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *Miller* v. *Barilla*, 549

F.2d 648 (9th Cir. 1977); *Robinson* v. *Bergstrom*, 579 F.2d 401 (7th Cir. 1978); *Walker* v. *Kruse*, 484 F.2d 802 (7th Cir. 1973).

No federal appellate court has denied immunity for the government-sponsored defense lawyer.

The cases make it clear that, so far as immunity is concerned, there is no distinction made among government-sponsored defense lawyers whether they be court-appointed, public defenders, or panel attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A. Even the NLADA *amicus curiae* brief supports the position that no distinction should be made. NLADA Brief 3. The panel attorney under the Criminal Justice Act, 18 U.S.C. § 3006A, should be treated the same as the public defender; in fact, absolute immunity has been given to both.

B. The Justifications for Absolute Immunity for Judges and Prosecutors Apply With Equal Force to Immunize the Government-Sponsored Criminal Defense Lawyer

1. *The judge, the prosecutor and the defense lawyer are equally essential to the administration of criminal justice*

The ABA Standards, *The Defense Function* (Approved Draft, 1971), § 1.1(a) makes it clear that "[c]ounsel for the accused is an essential component of the administration of criminal justice," and that a properly constituted court is a "tripartite entity consisting of the judge . . . counsel for the prosecution, and counsel for the accused."

In providing representation for the indigent accused of crime, the government-sponsored defense lawyer performs a public function as critical and important as the function performed by the prosecutor and the judge. He must be free to provide a vigorous and fearless defense

of the accused. Frequently, the courtroom climate is hostile to his efforts, especially when he represents an unpopular person or one accused of a heinous crime. When he provides the criminal defense at the behest of his government and in compliance with constitutional mandate, he performs an important public duty indispensable to the effective operation of the criminal justice system.

In the criminal courtroom, the judge, the prosecutor and the government-sponsored counsel for the accused all strive to achieve substantial justice within our judicial system. The judge and the prosecutor both have absolute immunity from civil liability. The defense counsel should also have absolute immunity.

2. *Where the function performed is in the judicial phase of the criminal process, the immunity granted the participant is absolute*

The criminal process involves investigative activities and judicial activities. Persons involved in the former are entitled to qualified immunity (*see Imbler* v. *Pachtman*, *supra*, 424 U.S. at 430), while those involved in the judicial phase are accorded absolute immunity. The *Imbler* case held a state prosecutor absolutely immune in his role as an advocate because his "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*

Butz v. *Economou*, *supra*, 438 U.S. 478, involved various federal participants in agency hearings. While some of the officials were granted only qualified immunity, all those involved in the judicial process were given absolute immunity. The federal hearing officer was absolutely immune because his role was "functionally comparable" to that of a judge, 438 U.S. at 513; the official who decided to initiate the administrative proceeding was

granted absolute immunity by analogy to prosecutorial immunity, 438 U.S. at 515-16; finally, and most significantly, the agency lawyer who presented the evidence was held absolutely immune, 538 U.S. at 516-17. This Court reasoned that the nature of the officials' responsibilities determined the immunity, and since the responsibilities were judicial in nature, immunity would be granted even in the administrative setting. The Court explained the necessity for absolute immunity:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall. (80 U.S.), at 348-349, 20 L.Ed. 646, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, supra, at 554, 18 L. Ed.2d 288, 87 S. Ct. 1213. *Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.* [Emphasis supplied] 438 U.S. at 512

The prosecutor's absolute immunity in *Imbler* was based not only on the function of initiating prosecutions, but upon the prosecutor's conduct of the trial. 424 U.S. at 424

> Attaining the system's goal of accurately determining guilt or innocence requires that *both the prosecution and the defense* have wide discretion in the conduct of the trial and the presentation of evidence. [Emphasis supplied] 424 U.S. at 426.

Petitioner argues that the function of the defense lawyer is uniquely dissimilar to that of the judge or prosecutor, and he should therefore be denied immunity. Pet. brief at 36-38. The judge, the prosecutor, and counsel

for the accused all work within the judicial phase of the criminal justice system. Of course, all three have differing functions. The mere fact that the prosecutor does not perform the same duties as a judge does not deprive him of absolute immunity; nor should absolute immunity be denied defense counsel because he does not act as a prosecutor or judge.

The specific function performed is not the test; rather, it is that the participant's immunity in the judicial phase be supported by policy considerations. The prosecutor does not have immunity because he acts like a judge; he enjoys absolute immunity because the justification for it "is based upon the same considerations that underlie the common-law immunities of judges." *Imbler* v. *Pachtman, supra,* 424 U.S. at 422-423. For the prosecutor, absolute immunity is granted for policy reasons similar to those which underlie the judge's absolute immunity; namely, that "harassment by unfounded litigation" would cause him to deflect his energies from his duties, and "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

The identical policy considerations employed in *Imbler* to provide absolute immunity for prosecutors apply with equal force to the government-sponsored defense lawyer. Harassment by unfounded litigation would deflect him from his important public duties, and his independent judgment during the course of a criminal trial might be shaded by the threat of his own liability.

Judicial and prosecutorial immunity are necessary to the healthy functioning of the criminal justice system. Society is benefited by judicial and prosecutorial immunity. The essential judicial functions served by the judge and prosecutor are fundamentally the same as those of the government-sponsored defense lawyer. All are "intimately associated with the judicial phase of the

criminal process." *Imbler* v. *Pachtman, supra,* 424 U.S. at 430. All should be treated alike in the determination of their civil liability.

Amicus curiae NLADA argues that the three participants in the criminal courtroom should be treated alike, but because it has concluded that the government-sponsored counsel for the accused should not have immunity, it is forced to advocate the position that the doctrine of absolute immunity for judges and prosecutors should be abrogated. NLADA brief at 14-16. The NLADA position is rationally indefensible. No judicial system could long exist if judges and prosecutors were liable to lawsuits for acts within the jurisdiction of their positions. Abrogation of absolute immunity for judges could cripple and ultimately destroy the effectiveness of the criminal justice system.

II. PUBLIC POLICY CONSIDERATIONS CALL FOR ABSOLUTE IMMUNITY FOR GOVERNMENT-SPONSORED CRIMINAL DEFENSE LAWYERS

The prosecutor is given absolute immunity "based upon the same considerations that underlie the common-law immunities of judges." *Imbler* v. *Pachtman, supra,* 424 U.S. at 422-423. A considered examination of the policy considerations supporting prosecutorial and judicial immunity leads to the conclusion that government-sponsored defense lawyers should be absolutely immune for similar policy reasons.

Absolute immunity for the criminal defense lawyer benefits the broad interests of the indigent client. Counsel for the accused is free to exercise his independent judgment without fear of the consequences of a civil suit from a dissatisfied client. Recruitment of lawyers to represent indigents is facilitated, thus providing for wider participation of the bar in the public duty of representing the poor.

Just as judicial immunity is "for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences," *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967), so absolute immunity for the criminal defense lawyer serves the broad interest of the client and the judicial system. "The reasoning which provides immunity for various public officials . . . is also applicable to the performance by private citizens of public services which play such a significant role in the administration of justice." *Walker* v. *Kruse, supra,* 484 F.2d at 802, 804.

A. The Position of the Government-Sponsored Criminal Defense Lawyer is Significantly Different from Privately Retained Counsel

The circumstances surrounding the representation of indigent clients accused of crime create a climate in which unfavorable results are more likely to occur than with paid representation. In the highly charged atmosphere of a criminal courtroom, where the state is exercising its power to deprive a citizen of liberty, emotions frequently erupt into unfounded charges of malice or lack of competence of the defense lawyer.

Where a client is able to pay for his private counsel, he is also able to select the lawyer he wants. He has a higher regard for his lawyer, who was probably chosen because of reputation or by referral from a trusted friend. The private lawyer is in a position to decide whether to represent the client, and is free to decline a client he considers troublesome. Even after represntation begins, he is generally freer to withdraw if difficulties arise.

On the other hand, as perceptively observed by *amicus curiae* NLADA, "indigent defendants have a fundamental distrust" of government-sponsored counsel. NLADA brief at 10. The indigent does not have the right to choose his

counsel, and the government-sponsored attorney generally cannot refuse representation. The indigent does not pay for legal services, and as in other aspects of life, anything easily obtained is lightly regarded. The government-sponsored lawyer must continue to represent troublesome or uncooperative clients, and is frequently called upon to take over the representation of such a client after private counsel has withdrawn. Giving a troublesome client who has a "fundamental distrust" of his lawyer the right to sue his lawyer will certainly not remedy his distrust, and will not accomplish anything to improve the lawyer-client relationship.

When an adverse decision is reached against the defendant and he faces conviction or imprisonment, he often seeks retaliation against the society which has denied him his freedom. He neither risks anything nor loses anything if he vents his anger in an action for damages against his own defense lawyer. After all, his counsel, if he is denied absolute immunity, will be the only participant in the judicial proceedings against whom action could be brought.

B. Suits Against Government-Sponsored Criminal Defense Lawyers Would Deflect the Lawyer's Energies

The caseload of the government-sponsored criminal defense lawyer is heavy. His duty to provide legal representation to the poor imposes great demands on his time and energy.

Any civil action against a government-sponsored criminal defense lawyer would deflect his energies from his main task of defending indigents accused of crime. If he is called upon to justify actions taken long ago, to prepare pleadings in his defense, to submit to discovery and even to trial, obviously he will have less time to provide services to his indigent clients.

"[A] deflection of the prosecutor's energies from his public duties" provides an important policy consideration to support absolute immunity for the prosecutor. *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423. The same policy consideration justifies absolute immunity for the judge. It should likewise support absolute immunity for the government-sponsored defense lawyer.

C. Recruitment Would Be Hindered

"To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions." *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049. Government-sponsored defense lawyers are underpaid and overworked. The additional threat of civil liability at the suit of the client for whom he labors could be the very factor that would discourage the lawyer from performing the vital function of representing the poor.

By analogy, who would want to be a judge if he could be sued by a dissatisfied litigant? Without absolute immunity, who would choose to be a prosecutor? Is it not reasonable that a criminal defense lawyer would hesitate to represent an indigent if such representation might culminate in an action for civil damages?

D. The Chilling Effect

> "[I]f an attorney must work in constant fear of civil liability, it is the rights of the public that will suffer. Any such threat of liability visits an obvious chilling effect upon the attorney's enthusiasm to vigorously defend his client's position." *U.S. General, Inc.* v. *Schroeder*, 400 F. Supp. 713, 717 (E.D. Wisc. 1975).

The "chilling effect" created by the threat of civil liability manifests itself in several ways. The govern-

ment-sponsored defense lawyer, faced with the threat of potential liability, will lose his independence to control the technical aspects of defense strategy. Because he had so much at stake personally, he will tend to accede to the many demands of his client for the filing of motions or subpoenaing of witnesses whether or not such tactics would be best indicated by circumstances. See *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049; *John* v. *Hurt*, 489 F.2d 786, 788 (7th Cir. 1973).

Judge Learned Hand described the chilling effect as the "constant dread of retaliation" when he proffered it as a policy consideration to provide the prosecutor with absolute immunity. *Gregiore* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir.), *cert. denied*, 339 U.S. 949 (1949). The threat of civil liability would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.*

An indigent accused of crime is constitutionally entitled to an effective defense. The lawyer must be free to exercise independent judgment in the management of the defense without, even subconsciously, shading his decisions with a view toward avoiding potential liability.

The "chilling effect" consideration supporting absolute immunity for a judge was expressed in *Butz* v. *Economou*, *supra*, 438 U.S. at 509:

> If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary could either be respectable or useful." [*Bradley* v. *Fisher*, 13 Wall. (80 U.S.) 335, 347 (1872)].

A civil action against a defense lawyer would be costly to him in terms of time, money and damaged reputation. The natural tendency would be to do whatever is necessary to avoid such a threat. The lawyer would tend, for example, to document every strategy meeting

with the client in which trial tactics were discussed, lest the meeting be later denied by the client. The practical experience of Pennsylvania public defenders suggests that the tendency would be to spend more time representing and trying to satisfy the most troublesome clients to the detriment of other indigents in need of defense services. The courts themselves might shade their decisions on post-conviction relief, even subconsciously, if the civil liability of the defense lawyer were at stake, as recognized by this Court in granting absolute immunity to prosecutors. *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427, 428.

E. The Existence of Other Remedies Reduces the Need for Private Damage Actions

Other effective remedies are available to the criminal defendant complaining of his lawyer's representation. He may assert his claim "by direct appeal, by state post-conviction remedies, and by federal habeas corpus petitions." *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049. In *Butz*, this Court supported judicial immunity by considering "the correctibility of error on appeal," 438 U.S. at 512, and stated that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Id.*

The availability of other effective remedies was reviewed as a policy consideration in the *Imbler* case to support absolute immunity for the prosecutor; this Court concluded:

> These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime. 424 U.S. at 529.

At the time of Ferri's criminal trial out of which this action arose, he was serving the last 8 years of a prison

term on a prior conviction. App. 8. In the indictment at issue, Ferri was sentenced for 20 years on bombing charges, Pet. brief at 7b, and he is not contesting that 20 year sentence. He is contesting, however, the additional 10 year sentence to commence after the expiration of the 20 year sentence. Ferri contends that a 3 year statute of limitations barred the prosecution on the revenue charges for which the 10 year sentence was imposed.

If Ferri is correct that the 3 year statute of limitations applies, then he has an adequate and complete remedy under the federal habeas corpus provisions of 28 U.S.C. § 2255. The failure of a lawyer to assert a statutory bar to prosecution, under any test, would entitle Ferri to have the additional 10 year sentence vacated.

A curious aspect of this case is that Ferri knows that he is entitled to apply for habeas corpus relief under § 2255 and has deliberately chosen not to do so. His brief explains that an unfavorable result might cause the dismissal of his civil action as collaterally estopped. Pet. brief at 42, n.23. He has elected not to apply for the relief which would be adequate and complete as it relates to the 10 year sentence not scheduled to begin until 20 years from the date of sentencing. He has chosen, rather, to seek money damages against his lawyer.

CONCLUSION

The government-sponsored criminal defense lawyer serves an indispensable public function in our criminal justice system. The same compelling public policy considerations which support absolute immunity for judges and prosecutors apply to justify absolute immunity for the government-sponsored defense lawyer. Together in the same criminal courtroom, they strive to achieve substantial justice for all.

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

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